BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSE V. MICHEL	)	
Claimant	)	
	)	
VS.	)	
	)	
NATIONAL BEEF PACKING COMPANY	)	
Respondent	)	Docket No. 270,798
	)	
AND	)	
	)	
CONNECTICUT INDEMNITY CO./	)	
ROYAL & SUN ALLIANCE	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the January 8, 2004 Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on July 20, 2004.

APPEARANCES

Diane F. Barger, of Wichita, Kansas, appeared for the claimant. Terry J. Torline, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ issued an Award granting claimant permanent total disability benefits for injuries sustained in a compensable injury on August 21, 2000. The ALJ specifically acknowledged a "cardiovascular condition" that was never definitively diagnosed, but

nonetheless concluded that condition limits claimant's ability to perform anything other than sedentary work. As a result, the ALJ concluded the claimant sustained a 100 percent task loss along with a 100 percent wage loss. That finding, coupled with her belief that the claimant's physical limitations limited his ability to find sedentary employment led her to find claimant was permanently and totally disabled.

Respondent appeals this determination alleging the following: (1) claimant failed to sustain his burden of proving the "cardiovascular condition" was a "personal injury" that "arose out of and in the course of his employment"; (2) the "heart amendment" precludes any recovery in this matter other than for the orthopaedic aspect of claimant's injury; (3) the ALJ erred in finding claimant was permanently and totally disabled; (4) claimant failed to attempt to perform the accommodated duty offered to him; and (5) the ALJ failed to address the claimant's functional impairment and preexisting impairment of function. Respondent concedes claimant is entitled, at best, to 10 percent whole body functional impairment for his work-related injuries. Respondent maintains any other recovery is precluded or limited based upon one or all of the arguments referenced above.

Claimant maintains the ALJ's Award of permanent total disability benefits is fully supported by the record and should be affirmed in all respects. He contends the ALJ appropriately considered the "cardiovascular condition" that surfaced during his post-injury physical therapy and functional capacity examinations (FCE's), which effectively preclude him from performing the job of cattle driver as well as any other position other than that involving exclusively sedentary activities. Thus, he believes he is entitled to permanent total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant, Jose V. Michel, sustained an acute injury on August 21, 2000, when he slipped and fell while walking up steps to his work platform. He injured his right leg and low back. After conservative treatment, claimant ultimately had surgery to his back on June 21, 2001. On July 18, 2001, claimant was released to return to work on light duty and on October 17, 2001, he was released to return to his regular job of pushing cattle. This job was performed on an elevated platform and involved constant standing and bending over cattle as they walked by his station. If the cattle stopped, claimant would have to push the cattle on past a metal bar as they were prepared for processing.

When claimant returned to work, he was only able to perform the job of cattle pusher for 20 minutes before he began to experience pain. He reported his complaints to his supervisor and was placed on a one month leave of absence. Claimant then returned to work on November 19, 2001, again as a cattle pusher. This time he had been given

permanent restrictions by Dr. William Reed, the treating physician. According to respondent, the cattle pusher job did not exceed those restrictions. Three times claimant attempted the cattle pusher job, but each time he was unable to continue after approximately 20 minutes due to pain. Claimant requested another position but was advised no others were available. He was placed on another leave of absence effective November 21, 2001, and has not worked for respondent since that date.

George Hall, the respondent's personnel director, testified that claimant never contacted him about returning to work after November 21, 2001. He maintains claimant could have returned to the job of cattle pusher and his wages would have been the same or more than he was being paid at the time claimant last worked.[1]

Since leaving respondent's employ, claimant has sought employment at various places including car dealerships, Wal-Mart and Dillons. Claimant produced a list of job contacts, but admitted it was incomplete. He stated he lost the sheet that contains the balance of his efforts. Claimant estimates he has applied for jobs 2 times per week and has sought assistance from the local Job Opportunity Center. Claimant says that he can't drive, stand for any significant period of time, sleep, or help his wife and is, as a result, depressed.

While claimant was undergoing physical therapy in September through November of 2001, Clair Bradbury, the therapist, noted claimant's heart rate would increase rather dramatically with lifting activities and that claimant was unable to stand for long periods of time. When claimant was performing the requested activities, he would complain of right lower extremity radicular pain and low back pain.[2] He would have balance problems after his walking and standing activities.

Ms. Bradbury concluded claimant was unable to return to his job of cattle pushing because it was difficult for claimant to stand for long periods and he had limited ability to bend or stoop. She believed claimant was putting forth good effort, but that given claimant's symptoms, there must be some sort of underlying disorder or disease.[3]

In April 2002, Claimant was referred to the Back to Action facility for an FCE. This evaluation was performed by Susan Rockley. On this first visit, the FCE was terminated after 45 minutes of activity because claimant was experiencing high blood pressure. Ms. Rockley was concerned about the possibility of stroke, particularly since claimant also suffers from diabetes. She testified that claimant gave a good effort but could only stand

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[1] Hall Depo. at 9-11.

[2] Bradbury Depo. at 18-19.

[3] *Id.* at 35-37.

for 7-8 minutes before his blood pressure would begin to rise. She concluded that it was not safe for claimant to return to work given the difficulties she observed during the FCE.[4]

On June 2, 2003, Stephen Taylor attempted to conduct an FCE, but terminated the evaluation because claimant's heart rate was elevated and would not return to safe levels. After approval from a physician, a second FCE was attempted. Claimant's resting heart rate was over 100. He was able to stand and walk occasionally, but claimant's overall capacity to stand, walk, climb and lift were limited by his elevated heart rate as well as his physical restrictions. Mr. Taylor was unable to differentiate whether claimant's limitations were based on the elevated heart rate or the physical restrictions.

After leaving his job with respondent, claimant was examined by three physicians. On January 15, 2002, claimant was seen and evaluated by Dr. C. Reiff Brown. Dr. Brown had seen claimant in 1991 for a work-related back injury and had issued a rating report, although this fact escaped his notice while he was in the process of evaluating claimant in 2002, as the earlier records had been destroyed. Dr. Brown examined claimant and diagnosed failed back surgery syndrome. He assigned a 5 percent whole body impairment as a result of the August 2000 accident.[5] Dr. Brown was also asked to review a videotape depicting the cattle driving job which was prepared by Raydee Rinehart, respondent's Safety Director. After doing so, he testified that the job was within claimant's abilities and the restrictions he imposed upon claimant. Those restrictions include no lifting over 40 pounds occasionally, and 20 pounds frequently. Claimant needs to avoid frequent bending and rotation of the lumbar spine more than 30 degrees. All lifting must be done utilizing proper body mechanics.[6]

During his deposition, Dr. Brown was also asked about a follow up letter he issued on September 25, 2003. The letter was made in response to questions about a FCE evaluation performed by claimant. According to Dr. Brown, claimant expressed a significant number of subjective problems and also exhibited a resting heart rate before the test began of 115 beats per minute which is abnormal. Dr. Brown noted that during the test, claimant's vital signs, particularly his heart rate and blood pressure, skyrocketed with minimal performance. As a result, the test was suspended. Dr. Brown does not know the reason for the cardiovascular anomaly, but concluded there is "something else wrong" with claimant.[7] He went on to say that claimant is clearly physically deconditioned and that deconditioning prevented claimant from being rehabilitated from his work-related injury and the subsequent surgery.

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[4] Rockley Depo. at 93.

[5] Brown Depo. at 8.

[6] *Id.,* Ex. 2 at 2.

[7] *Id.* at 12.

On April 14, 2003, claimant was examined by Dr. Paul S. Stein, pursuant to an order under K.S.A. 44-510e(a). Dr. Stein diagnosed claimant with an aggravation of a preexisting lumbar degenerative disk disease. Dr. Stein noted an instability as well as a slight limp in claimant's gait. He also observed symptom magnification behavior. Dr. Stein assigned a 15 percent whole body impairment, but opined that 5 percent of that figure would have preexisted the August 2000 accident.

Dr. Stein imposed restrictions based upon a FCE he reviewed and considered valid. Those restrictions were as follows: sedentary physical demand, bend-stoop no greater than 5 percent per hour, no stair climbing greater than 5 percent per hour, no ladder climbing, no standing or walking greater than 10 percent per hour, no squatting or kneeling, lifting 10 pounds occasionally, 5 pounds frequently and 2 pounds constantly.[8] He further testified that the restrictions were all attributable to the August 2000 accident as claimant had returned to work following his 1990 accident.

Claimant was last examined by Dr. Peter V. Bieri, at the request of his attorney, on May 20, 2002. Claimant complained of low back and right leg pain. Dr. Bieri documented palpable muscle spasms and guarding at the extreme ranges of motion during the examination. He also noted a slightly antalgic gait, favoring claimant's right side. Dr. Bieri diagnosed spinal stenosis, a herniated nucleus pulposus on the right at the level of L4-5 with right lower extremity radiculopathy. He assigned 10 percent impairment for the lumbar impairment, plus an additional 7 percent for range of motion deficits along with 10 percent to the right lower extremity. When combined, the result is 19 percent to the body as a whole.[9] He also adopted the restrictions generated as a result of the FCE and testified that claimant was unable to perform the tasks involved in the cattle driver/pusher job.[10]

When asked, Dr. Bieri testified that claimant's earlier injury from 1991 was to a different area of the low back. He found no references to the L4-5 portion of the back in any of claimant's prior medical records. Accordingly, he concluded this injury represents a new injury and not an aggravation of an earlier injury.

Respondent retained Dan Zumalt to review the tasks involved in the cattle pushing job and opine whether the physicians' restrictions precluded claimant from performing the job. Mr. Zumalt reviewed the restrictions imposed by Drs. Brown, Reed and Bieri and concluded claimant was capable of performing the job within the restrictions of each of those practitioners. He reviewed Dr. Stein's restrictions and conceded that they would

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[8] Stein Depo., Ex. E.

[9] Bieri Depo. at 10-11, Ex. 3 at 5-6.

[10] *Id.* at 14-17.

prohibit claimant from performing the cattle pushing job.[11] He further testified that in order to find a job, he would expect at least 10 job contacts per week as an effective means to locate employment.

At the request of his counsel, claimant was interviewed by Jim Molski, a vocational rehabilitation consultant. Mr. Molski identified 8 tasks involved in claimant's 15 year vocational history. He also testified that considering Dr. Brown and Dr. Reed's restrictions, claimant has the capacity to earn $5.50 - $6.50 per hour.

Dr. Stein testified that of the 8 tasks identified by Jim Molski, claimant was unable to perform any of them, thus yielding a 100 percent task loss. Dr. Bieri indicated that claimant was unable to perform at least 7 if not all 8 of the tasks.[12] According to him, if claimant is required to be on his feet more than 10 minutes at a time, he is unable to perform the task at hand. Thus, he concluded claimant has between 88 and 100 percent task loss.

Respondent concedes claimant sustained a compensable injury on August 21, 2000, which required treatment and has resulted in permanency. It is the extent of permanency that has resulted and specifically whether claimant's apparently undiagnosed but undisputed "cardiac condition"is work-related that is the true dispute between these parties.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[13] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[14]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[15]

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[11] Zumalt Depo. at 29-30.

[12] Bieri Depo. at 18-19, Ex. 6 at 1.

[13] K.S.A. 44-501(a) (Furse 2000).

[14] K.S.A. 2001 Supp. 44-508(g).

[15] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991), *rev. denied* 249 Kan. 778 (1991).

Here, claimant maintains the ALJ correctly found him to be permanently and totally disabled. K.S.A. 44-510c(a)(2)(Furse 2000) defines permanent total disability as follows: "Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment." The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in *Wardlow*[16] looked at all the circumstances surrounding that claimant's condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

The greater weight of the evidence in this claim indicates claimant can no longer do the job of cattle pusher. The job requires the worker to walk up onto a platform and remain standing for the entirety of the 8 hour shift, bending and pushing. These are activities that claimant is, by all accounts, unable to do as a result of his physical limitations and deconditioning along with the resulting elevated heart rate. Because claimant performed the cattle pusher for the better part of 20 years, the ALJ appropriately found a 100 percent task loss. However, the fact that he can no longer perform his job and has a 100 percent task loss does not, standing alone, equate to a finding of permanent total disability.

The FCE results, which were found to be valid by the medical practitioners, show that claimant is capable of sedentary work. Indeed, there is no medical testimony which suggests that claimant is incapable of performing such work. Jim Molski testified that claimant retains the capacity to earn $5.50 to $6.50 per hour. Ideally, this respondent could have reassigned claimant to a sedentary position or offered some sort of vocational retraining in an effort to avoid any further liability under the Act for this task loss. For whatever reason, that was not done. Nonetheless, the Board finds the evidence does not support a finding of permanent total disability. Instead, the Board finds the ALJ's Award should be modified to grant claimant a work disability based upon his 100% task loss.

Work disability analysis also requires the Board to consider claimant's wage loss and his good faith attempt to secure appropriate employment following his separation from respondent's employ. The statutory language at issue is the language found in K.S.A. 44-510e(a)(Furse 2000) which states:

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

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[16] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

However, K.S.A. 44-510e(a)(Furse 2000) limits a claimant to functional impairment so long as claimant earns a wage equal to 90 percent or more of the pre-injury average weekly wage.

If claimant refuses to accept or even attempt to perform reasonably offered accommodated work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation.[17] Even if accommodated work is not offered, claimant still must show she made a good faith effort to find employment. If claimant did not make a good faith effort, a wage will be imputed to claimant based on the evidence in the record as to claimant's earning ability.[18]

Under these facts and circumstances, the Board concludes that claimant has made a good faith effort to find appropriate employment. Respondent made no attempt to provide claimant with accommodated employment. The evidence indicates claimant made some effort to speak with his supervisor, George, in the hopes of obtaining alternative employment in a position other than that of cattle pusher. Unfortunately, it appears that no other job was offered to him. Respondent's own physician, Dr. Brown, testified claimant is capable of performing only sedentary work based on his FCE results.[19] He testified that he has looked for employment, on average, 2 times per week, and has registered at a local employment office. Given the geographic area, his limited employment background, the language barrier (claimant does not speak fluent English) and the fact that he is limited to sedentary work, it is not surprising that he has not been successful at finding a job. There is little evidence to suggest that claimant has been less than diligent in his efforts. For these reasons, the Board affirms the ALJ's finding that claimant bears a 100 percent wage loss.

When the 100 percent task loss is averaged with the 100 percent wage loss, the Board finds claimant sustained a 100 percent permanent partial general body disability as a result of his August 21, 2000 work-related injury.

Although respondent stridently argues that the "cardiac condition" referenced by the ALJ is wholly precluded by the "heart amendment", the Board disagrees. K.S.A. 44-501(e)(Furse 2000) provides as follows:

> Compensation shall not be paid in case of coronary or coronary artery disease or cerebral vascular injury unless it is shown that the exertion of the work necessary

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[17] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[18] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[19] Brown Depo. at 13.

> to precipitate the disability was more than the employee's usual work in the course of the employee's regular employment.

The obvious purpose of this amendment is to limit compensability for cases involving heart attacks and strokes and reverse a long line of Supreme Court decisions in which compensation was awarded even though preexisting heart or vascular conditions may have been a predisposing factor.[20]

Here, it is uncontroverted that claimant developed an abnormally elevated heart rate after surgery for his work-related accident and during the course of physical therapy and the FCEs. Curiously, at no point during the litigation of this claim did any physician make any attempt to diagnose claimant's condition. Although the ALJ concluded claimant had a "cardiac condition", no physician has made a definitive diagnosis. Nonetheless, the evidence makes it clear that the condition, however defined, commenced after claimant had surgery and during his recovery. The Board finds the condition is a natural and direct consequence of claimant's work injury.

Given claimant's obvious deconditioned state following surgery, it is reasonable to conclude that the pain he encountered during physical therapy and the FCE's caused his heart rate to increase. When claimant was involved in physical therapy after surgery, he became pale and sweaty, which is an indication of pain behavior.[21] According to Clair Bradbury, claimant's elevated heart rate following activity is a general physiological indication of fatigue and possibly deconditioning.[22] Claimant may well have some other disease process at work, but the record is simply silent as to this issue. Without more, the Board is unable to accept respondent's contention that the "heart amendment" applies. Accordingly, the ALJ's Award is affirmed to the extent that claimant sustained a 100 percent task loss and a 100 percent wage loss, but is modified to grant claimant a 100 percent work disability, thus reversing and setting aside the ALJ's conclusion that claimant is permanently and totally disabled as a result of his work-related injury while employed by respondent.

All other findings are affirmed to the extent they are not modified herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated January 8, 2004, is modified as follows:

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[20] *Mudd v. Neosho Memorial Regional Med. Center*, 275 Kan. 187, 190, 62 P.3d 173 (2003).

[21] Bradbury Depo. at 13-14.

[22] *Id.* at 18.

The claimant is entitled to 48 weeks of temporary total disability compensation at the rate of $348.83 per week or $16,743.84 followed by permanent partial disability compensation at the rate of $348.83 per week not to exceed $100,000 for a 100% work disability.

As of August 19, 2004 there would be due and owing to the claimant 48 weeks of temporary total disability compensation at the rate of $348.83 per week in the sum of $16,743.84 plus 160.43 weeks of permanent partial disability compensation at the rate of $348.83 per week in the sum of $55,962.80 for a total due and owing of $72,706.64, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $27,293.36 shall be paid at the rate of $348.83 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of August 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Diane F. Barger, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director